Task Force on Judicial Candidate Campaign Conduct
Commission for Impartial Courts

Judicial Council of California
JCCC Redwood Room
455 Golden Gate Avenue
San Francisco, California, 94102

April 30, 2008
10:00 a.m. – 3:00 p.m.

Minutes

Members present: Hon. Douglas Miller, Chair, Mr. Thomas Burke, Hon. Joseph Dunn, Hon. Richard Fybel, Mr. Dennis Herrera, Ms. Beth Jay, Hon. Ronni MacLaren, Hon. Rodney Melville, Mr. Sean Metroka, Hon. James Mize, Professor Mary-Beth Moylan, Hon. Maria Rivera, Hon. Byron Sher, Mr. Alan Slater, and Hon. Nancy Wieben Stock.

Members absent: Ms. Christine Burdick, Hon. Michael Garcia, Mr. James Penrod, and Professor Kathleen Sullivan.

Staff present: Mark Jacobson, Committee Counsel, Sei Shimoguchi, Committee Counsel, and Susan O'Brien, Administrative Coordinator.

Consultant present: Professor Charles Geyh

1. Introduction

Justice Miller welcomed the members and stated the objectives for the meeting. He explained that the task force would be discussing various issues presented by the working groups, but would not be voting on proposals.

2. *White* Working Group

Discussion:

Justice Fybel provided an overview of the deliberations of the working group and noted that its memo of April 25, 2008 is intended as a "discussion draft." The working group concluded that *White* should be narrowly interpreted and addressed the following amendments to the Code of Judicial Ethics: (1) adding a definition of "impartiality," possibly using the Model Code of Judicial Conduct as a guide; (2) adding hortatory provisions (e.g. "should" or "encouraged" instead of "shall") that would encourage judges to take an active role in educating the community on the meaning of an impartial judiciary, and to discuss topics such as their qualifications for office, impartiality, and the courts; (3) providing that a judge is disqualified if he/she makes a statement that "commits" to a particular result; and (4) explaining why the code does not include

"pledges and promises" language as in the model code. The working group determined that there was no need to change the misrepresentation provisions in canon 5B. It was also determined that additional research was needed concerning the issues of campaign contributions, endorsements, solicitation, and public comment on pending cases.

Definition of "impartiality." The working group determined that the code should include a definition of "impartiality" because this term is frequently used in the canons. In connection with developing a definition, the task force discussed adding commentary to the code that would (1) provide a historical context for the definition that is specific to California, (2) point out the importance of an impartial judiciary, (3) provide an explanation of why California changed to non-partisan elections, and (4) provide an explanation of how California is trying to avoid what is happening in other states. Professor Geyh said that historically, the focus of "impartiality" has been on bias concerning parties and issues. He added that the ABA definition of "impartiality," which includes "bias" and "openmindedness," is fairly innocuous. Justice Fybel said that if the task force is to tinker with the ABA definition, it must have a good reason to do so.

Hortatory provisions. Upon the working group's recommendation, task force members discussed adding hortatory provisions to the code that would encourage judges to (1) take an active role in educating the community on the meaning of an impartial judiciary, and (2) discuss topics such as qualifications, impartiality, and the courts. The members agreed that it should be made clear in the code that this is not conduct judges are obligated to undertake. It was suggested that in connection with these proposed amendments there should be language stating that a judge's judicial duties take precedence over all the judge's other activities (which is required by canons 3A and 4A). The members indicated a preference for using the term "encouraged" instead of "should." They rejected the idea of adding these provisions to the Standards of Judicial Administration.

One member suggested that hortatory language be added to the commentary as a foundation. The provisions would then be implemented through guidelines issued to presiding judges. Another member raised a concern about the following proposed amendment to the commentary to canon 4B:

> **As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law, ~~and~~ improvement of criminal and juvenile justice, and education of the public on the meaning and importance of an impartial judiciary. To the extent that time permits, a judge ~~may~~ is encouraged to do so, either independently or through a bar or judicial association or other group dedicated to the improvement of the law.**

The member questioned whether it would be appropriate to "encourage" judges to engage in certain conduct, such as advocating for changes in the law.

Disqualification. In response to *White*, the ABA added a provision to the model code under which a judge is disqualified if he or she made public statements during a judicial campaign that commit or appear to commit the judge to a particular result regarding an issue that is before the court. The task force members discussed whether a similar provision should be included in California's disqualification rules, which for trial judges are contained in the Code of Civil Procedure (CCP). There was a suggestion that this provision be placed in the Code of Judicial Ethics instead of the CCP in light of the broad language in the California Constitution allowing the Supreme Court to make rules governing the conduct of judge and judicial candidates.

Some members questioned whether to include the "appears to commit" language in the disqualification rule because this phrase was deleted from canon 5B (which regulates candidate speech) after *White* as overinclusive. Professor Geyh said that under the existing appearance standard in CCP section 170.1(a)(6)(A)(iii), which provides that a judge is disqualified if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial," an apparent commitment could already be grounds for disqualification. He noted, however, that including the phrase in the disqualification rule would not impermissibly bar a judge from making an apparent commitment. Instead, a judge who had made an apparent commitment would just be required to step aside, thereby avoiding any First Amendment problem. Professor Geyh said that in the ABA's view, "appears to commit" is a form of "appearance of bias." The consensus of the members was to move toward a more objective standard.

Task force members also discussed whether the new provision should contain a temporal element in the event that a judge who has made a public "commitment" changes his/her view on that issue. The proposed amendment to CCP section 170.1(a)(9) in the *White* Working Group's April 25, 2008 memo states that a judge shall be disqualified "for the remainder of the judge's term of office." The task force members expressed disfavor of a temporal limitation. Moving toward an objective test may resolve this issue, and statements can be considered on a case-by-case basis.

Absence of a "pledges and promises" clause. In *White*, the Supreme Court struck down the "announce" clause in Minnesota's code of judicial conduct but declined to address the constitutionality of its "pledges and promises" clause. California, however, has never had a "pledges and promises" clause in its code; instead, canon 5B prohibits a candidate from making statements that commit the candidate with respect to cases, controversies, or issues that could come before the courts. The members discussed whether there should be commentary explaining why the California code does not include the "pledges and promises" clause. Professor Geyh posited that the absence of this clause was acceptable because all "promises" are "commitments." A member suggested that the lack of this clause can be explained by saying it's superfluous, not that it's synonymous with "commitments."

Action:

The working group will meet and further consider the above recommendations.

3. Committee on Public Comment on Pending Cases – Best Practices Working Group

Discussion:

Judge MacLaren presented the committee's recommendations in the absence of Judge Garcia (committee chair).

Barring public comment by attorney candidates. The committee considered whether the prohibition against a judge publicly commenting on a pending or impending proceeding (canon 3B(9)) should be extended to attorney candidates. The committee determined that the prohibition should be extended to attorney candidates. However, there was a split in opinion among the committee members concerning this recommendation. One view is that this recommendation infringes the First Amendment rights of attorney candidates. The other view is that it is constitutional because (1) the proscription is narrow (only applies to pending and impending cases), (2) candidates should be able to show that they can abide by rules that apply to judges, and (3) a successful candidate may take over the challenged judge's court, and may therefore be faced with handling cases the candidate commented on during the campaign.

Task force members discussed the need to "level the playing field," but differed on whether this should be done by limiting attorney speech or by finding other ways to let a judge defend himself/herself if a challenger attacks the judge's ruling in a pending case. Professor Geyh said that judges aren't permitted to publicly comment on cases because of due process concerns, but attorney candidates are not similarly situated. He felt that the blanket prohibition against public comment by judges may already be unconstitutional and extending the prohibition to attorneys may add to the problem. The members voted to not apply the prohibition to non-judge candidates because it would be unconstitutional.

Amending canon 3B(9) to allow a judge to respond to an attack. The committee considered whether to amend canon 3B(9) to allow a judge to respond to an attack. The committee recommended amending the commentary to canon 3B(9) to state that it is permissible for a judge to quote a statement made in open court, or to provide an official transcript of an open court proceeding. One task force member questioned whether this amendment is necessary; others indicated that not all judges may know that this conduct is permitted. It was determined that the committee would give this recommendation additional consideration.

Responding to an attack by a third party. The committee considered whether a judge should respond to an attack concerning a pending or impending proceeding through a third party, such as an oversight committee. The committee recommended that the bench and bar create local standing committees, without judge members, that could respond to

inappropriate criticisms of judges and that would not be limited to the election context. This would differ from an oversight committee, which may include judges and which only operates in the election context. Task force members discussed whether a judge should be able to file a complaint with the standing committee or otherwise alert it to the fact that a candidate is attacking a ruling. The members noted that there are two other bodies that a judge could turn to for help: CJA's Response to Criticism Team and the new Supreme Court Committee on Judicial Ethics Opinions. It was determined that the committee would give this recommendation additional consideration.

Action:

The committee will meet and further consider its recommendations concerning amending canon 3B(9) and responding to attacks through third parties.

4. Committee on Questionnaires – Best Practices Working Group

Discussion:

Mr. Metroka (committee chair) provided a report on the committee's recommendations.

The committee considered how to handle the issue of judicial questionnaires generated by special interest groups. The committee reviewed staff's January 17, 2008 memo on questionnaires and came up with two potential mechanisms that they liked: (1) developing a model letter to be used in response to an interest group questionnaire (the committee liked the letter prepared by Steven Pflaum set forth in staff's memo); and (2) developing a model questionnaire that focuses on the candidate's qualifications (the committee liked the Oregon model questionnaires contained in staff's memo but didn't like having one questionnaire for judges and one for attorneys). The committee did not reach a recommendation on who should propound the model letter and/or model questionnaire.

Task force members discussed who should propound the model letter or questionnaire; possible entities mentioned were the State Bar, CJA, and the League of Women Voters. Professor Geyh noted that candidates should be advised that under *White*, they may not be prohibited from providing more information than that requested in the model questionnaire. One member suggested that a judge should indicate why he/she is not providing information beyond what is asked in the model questionnaire. The members determined that national organizations such as the National Center for State Courts and the American Judicature Society should be contacted to see if they have created model questionnaires or would be interested in getting involved. Professor Geyh said this is something these organizations may be interested in doing and could get funding for.

The task force also discussed a comprehensive approach under which, in addition to model letters and questionnaires, a memorandum by the National Ad Hoc Advisory Committee on Judicial Campaign Oversight providing advice on how to respond to questionnaires would be distributed to candidates.

Action:

The committee will meet and further consider its recommendations.

5. Committee on Candidate Education and Training – Best Practices Working Group

Discussion:

Mr. Slater (committee chair) provided a report on the committee's recommendations.

Mandatory candidate training. The committee considered whether there should be mandatory training on ethical campaign conduct for all judicial candidates. The committee recommended that: (1) there should be mandatory candidate training; (2) the Code of Judicial Ethics should be amended to provide for candidate training; (3) the training program should be developed by CJER and the State Bar, and should be available online; and (4) an interactive course should be made available so that questions could be asked.

Task force members discussed what would happen if a non-judge decided not to take the course; it was noted that this is something his/her opponent could publicize during the election. The members discussed whether training should be made mandatory or voluntary. Mr. Slater said the committee thought it may not be practical to have all 58 counties institute voluntary training programs. One task force member noted that a mandatory training law would likely pass because legislators are required to take ethics training. It was also noted that judges are already required to attend New Judge Orientation and the judges' college, so some additional training should not be a problem. The members also discussed whether to make this training an MCLE requirement for attorney candidates.

The committee will explore adding a training requirement through legislation and adding an MCLE requirement.

"Hotline" for judicial candidates. The committee considered whether a "hotline" should be created to provide judicial candidates with advice on campaign conduct. Given that CJA already operates a "hotline" that provides advice to judicial candidates, including attorneys, the committee recommended that CJA publicize this fact. Judge Mize indicated that this would not be a problem for CJA.

Brochures to educate candidates and the media. The committee considered whether brochures should be developed to educate candidates and the media about judicial elections. The committee recommended that AOC and the State Bar collaborate to develop brochures about judicial elections that could be distributed to candidates and the media. Brochures for judicial candidates could be distributed through voter registrars.

Task force members suggested that there could also be collaboration with CJA and the NCSC in developing the brochures.

Mark Jacobson noted that the Task Force on Public Information and Education is covering the issue of education of the media. The members agreed that education of the media should be handled by that task force.

Action:

The committee will meet and further consider its recommendations.

6. Committee on Campaign Contributions: Solicitation, Disclosure, and Disqualification – Best Practices Working Group

Discussion:

Judge MacLaren (committee chair) reported on the committee's recommendations.

Contributions from attorneys who appear before a judge. The committee considered whether there should be restrictions on contributions from attorneys who appear before a judge-candidate. The committee recommended that there be no restrictions. If these contributions were restricted, money would come from candidates and special interest groups. It would also put judges at an unfair disadvantage. The committee felt that this issue should be dealt with through disclosure and disqualification. Task force members expressed no opposition to this recommendation.

Prohibiting personal solicitation or acceptance of campaign contributions. The committee considered whether to modify canon 5 to prohibit a judicial candidate from personally soliciting or accepting campaign contributions except through an authorized campaign committee. The committee rejected this proposal. Task force members did not disagree with this recommendation.

Clarifying how judges can comply with campaign contribution disclosure requirements. The committee considered whether canon 3E(2) should be amended to clarify how sitting judges can comply with campaign contribution disclosure requirements. A problem in this area is the disparity between the counties regarding how much money must be raised for a judicial campaign. The committee recommended that the threshold amount at which a judge is required to disclose that a party, attorney, law firm, or witness appearing before the judge has contributed to the judge's campaign should mirror the FPPC reporting requirement (Government Code section 84211(f)), which is currently $100. The threshold amount would increase if the FPPC figure is later amended. This recommendation could be implemented either by amending the commentary to the canon or by obtaining an opinion from the new Supreme Court Committee on Judicial Ethics Opinions. Task force members did not express opposition to this recommendation.

The committee recommended that a judge be required to maintain a list of contributors that is either posted in the courtroom or kept at the clerk's desk. The list should be updated at least weekly and the judge should refer to the list on the record. Some task force members indicated a preference for keeping the list at the clerk's desk to avoid the coercive effect of having it posted on the wall.

The committee also considered how long a judge should be required to disclose a campaign contribution that is over the threshold amount. The committee recommended that there be a one-year disclosure requirement for campaign contributions, unless the contribution is unusually large. Task force members did not express opposition to this recommendation.

The committee recommended that these changes be implemented by amending the commentary to the canon; Judge MacLaren also suggested that an opinion could be requested from the new Supreme Court Committee on Judicial Ethics Opinions.

Threshold amount for disqualification. The committee considered whether there should be a threshold amount at which a judge is disqualified from hearing a case involving a person who has contributed to the judge's campaign. The committee could not come up with a number that would work on a statewide basis and therefore recommended against setting a threshold amount mandating disqualification. Disqualification should continue to be governed by the standards the Code of Civil Procedure section 170.1(a)(6).

Task force members debated whether there should be a threshold amount. Professor Geyh said there is a common perception that judges "don't get it" on this issue. In West Virginia and Illinois, for example, judges weren't recusing in the face of contributions of millions of dollars. Professor Geyh added that even setting a high limit, i.e., one that might be appropriate for larger counties but not smaller ones, protects impartiality and would be well-received by the public. One member felt that a fixed amount would become a de facto limit on contributions and that this could be better handled through disclosure and disqualification. Another member felt that setting a threshold amount might cause judges who receive less than that amount, even if the threshold is very high, to feel that disqualification is not necessary. Some members suggested that a typical member of the public would feel that a $1000 contribution should trigger disqualification. Some members noted that the problems being experienced in other states on this issue are on their way here, and that California should plan for this.

It was also discussed that a threshold amount could be used by a litigant to intentionally disqualify a judge. For example, if the threshold were set at $3000, a litigant who did not like the judge could contribute that amount to the judge's campaign to force the judge's disqualification. A way around this problem is to include a provision that would allow the other side to waive disqualification.

The task force members voted on whether there should be a threshold amount; the vote was 7-6 against. The members decided that the committee should reconsider this issue and draft alternate recommendations, one for and one against having a threshold amount.

The recommendation for having a threshold amount should state what the amount should be.

Action:

The committee will meet and further consider its recommendations. The committee will also consider how long a judge should be disqualified from hearing matters involving someone who makes a campaign contribution that causes the judge's disqualification.

7. Committee on Slate Mailers, Endorsements, and Misrepresentations – Best Practices Working Group

Discussion:

Judge Stock (committee chair) reported on the committee's recommendations.

Slate mailer disclaimer. The committee considered whether the "disclaimer" requirement in Government Code section 84305.5(a) should be strengthened, and whether a different disclaimer should be required if a candidate is added to a slate without the candidate's permission. The committee recommended amending section 84305.5(a) to include reference to canon 5 and its proscription against judges supporting or endorsing political candidates or causes. Section 84305.5 should also be amended to require that it be prominently disclosed whenever a candidate is placed on a mailer without his/her consent. The committee also recommended that the language of this code section be revisited with a view toward clarifying the groups or entities to which it applies. The committee further recommended that judicial campaign instructional materials should be prepared that include an admonition that canons 3 and 5 could be violated if a candidate allows the use of his/her name on mailers that are inconsistent with the integrity and impartiality of the judiciary.

Slate mailers/organizational communications. The committee also considered mailers sent by organizations such as unions and professional associations. A candidate does not buy space on this type of mailer and has no control over its content. The committee determined not to recommend action to preclude allowing candidates' names to be contained in these mailers; a blanket ban would be overbroad.

Endorsements. The committee considered the standards candidates should follow regarding endorsements. The committee recommended that all judicial candidates ascribe to a voluntary standard of refraining from use of an endorsement unless written permission has been received from the endorser. Candidates should also withdraw endorsements immediately on request of an endorser without the need for written confirmation. These practices could be instituted through pre-campaign instructional material or voluntary pledges associated with local oversight committees. The committee rejected setting time limits on endorsements or requiring candidates to obtain separate endorsements for primary and general elections. The committee also determined not to require a rule disallowing reference to political party affiliations.

Misrepresentations. The committee considered ways to address misrepresentations made during judicial campaigns. The committee recommended that canon 5 be amended to require a candidate to take reasonable measures to control the content of campaign statements and the conduct of campaign supporters and committees acting on the candidate's behalf. A candidate's duty should also extend to reviewing and approving all campaign statements and materials produced by the candidate or the candidate's campaign committee prior to dissemination. Combining this with a voluntary written commitment to "truth in advertising" would strengthen the existing system.

Concerning the misuse of the "temporary judge" title by attorney candidates, the committee recommended (1) that the local courts provide voter registrars with a letter containing instructions and explanations about the misuse of the title before each election cycle, (2) that canon 6 be revisited with an eye toward clearing up ambiguities on how the title may be used, and (3) that courts be encouraged to provide local oversight in addition to the training that is required for temporary judges.

Lastly, as to attorney oversight, the committee recommended that emphasis be placed on voluntary oversight committees and other proactive solutions addressed by the committee on voluntary codes of conduct and oversight committees.

Action:

The task force did not have time to fully discuss these recommendations. They will be discussed further at the next full task force meeting.

8. Committee on Voluntary Judicial Campaign Codes of Conduct and Oversight Committees – Best Practices Working Group

A written report prepared by Ms. Burdick (committee chair) was distributed at the meeting. There was not an oral presentation on the committee's recommendations at the meeting. These recommendations will be discussed at the next full task force meeting.

9. Next steps

The *White* Working Group and the committees of the Best Practices Working Group will meet independently and discuss their recommendations. All subsequent recommendations should be presented in a consistent written format. Concerning the task force's final report, staff will provide background information for incorporation that will give context to the task force's recommendations. The next meeting of the full task force will be in September.

Adjournment

Justice Miller adjourned the meeting at 3:05 p.m.